

Appeal from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, upholding the determination of the Prestonsburg Area Office that the Commonwealth of Kentucky had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint alleging damage to improvements from subsidence caused by an underground coal mining operation. TDN No. 91-83-232-50.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Subsidence

An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint charging damage to improvements from subsidence caused by an underground coal mining operation will be affirmed on appeal where the complainant fails to show the state regulatory authority's action was arbitrary, capricious, or an abuse of discretion.

APPEARANCES: Ronald Maynard, Hardy, Kentucky, pro se; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ronald Maynard has appealed from a November 1, 1991, decision of the Lexington Field Office (LFO), Office of Surface Mining Reclamation and Enforcement (OSM), responding to Maynard's request for informal review of a July 12, 1991, determination of the Prestonsburg Area Office (PAO), OSM. PAO held that the Commonwealth of Kentucky, Natural Resources and Environmental Cabinet, Department for Surface Mining Reclamation and Enforcement (DSMRE), had shown good cause for not taking enforcement action

in response to a 10-day notice (TDN) on Maynard's citizen's complaint. That complaint alleged damage to improvements caused by subsidence related to underground coal mining by Rawl Sales & Processing Company (Rawl Sales), pursuant to permit No. 898-5228.

In a letter dated June 3, 1991, received by OSM on June 4, 1991, Maynard requested a "formal investigation into structural damage to my house due to subsidence from subjacent underground mining activity." He stated that his house had been constructed in 1968 and an in-ground swimming pool installed in 1976 and that neither had experienced any settling or structural deviation until April 1991, when structural damage occurred to both. He asserted that the damage to his house and pool occurred as a result of underground coal mining activity in the Pond Creek coal seam "by Big Bottom Coal Company and/or Rawl Sales and Processing Company" in December 1989. 1/ He claimed that mine maps showed that "pillars were pulled and the area 'SEALED' due to 'water and bad top.'" He also asserted that the maps revealed mining in areas beyond the permitted area. Finally, he claimed it was his understanding that the Pond Creek coal seam was approximately 75 feet deep in the vicinity of his house and that mining had taken place within 80 to 100 feet of his house. 2/

On June 6, 1991, OSM issued TDN No. 91-83-232-50 to DSMRE. In its June 18, 1991, response to the TDN, DSMRE explained that it had investigated the complaint in May and found "no evidence of mine subsidence between the area of pillar extraction and Mr. Maynard's home." 3/ In a letter dated July 12, 1991, PAO informed Maynard that it had determined that DSMRE had shown good cause for not taking enforcement action. Maynard sought informal review by LFO in accordance with 30 CFR 842.15(a).

In its November 1, 1991, decision, LFO found, based upon an undated report (Report) prepared by OSM mining engineer, Ralph J. Blumer, in response to Maynard's request for informal review, that damage to Maynard's

1/ There are various references in the file to "Big Bottom Coal Company." However, it does not appear that any such company was involved in the mining in question; rather, the mining occurred at the Big Bottom Mine permitted to Rawl Sales. See letter to OSM from Project Engineer, Rawl Sales, dated Aug. 30, 1991. Also, the coal seam in which mining took place is referred to in the record as either the "Pond Creek" seam or the "Pond Fork" seam.

2/ Maynard did not charge, nor did DSMRE or OSM investigate, a violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) prohibition against mining within 300 feet of an occupied dwelling. 30 U.S.C. § 1272(e)(5) (1988). That prohibition, however, is subject to valid existing rights and to waiver. Id.

3/ The record contains a copy of a DSMRE "Citizen's Request for Inspection" form, signed by the Chief Inspector on June 4, 1991, and the Regional Administrator on June 5, 1991, showing that on Apr. 26, 1991, Maynard orally complained to DSMRE regarding the subsidence and that on May 5, 1991, and May 16, 1991, DSMRE personnel reviewed mine maps and inspected Maynard's home and concluded that the damage was not caused by subsidence.

house and swimming pool was not the result of subsidence. ^{4/} It concluded that PAO properly determined that DSMRE had shown good cause for not taking enforcement action on that basis. ^{5/}

In his Report, Blumer briefly listed the damage he observed at Maynard's home, including cracks in a concrete patio, cracks in brick veneer in the garage and house, cracks in the house foundation and the swimming pool, cracks in a stone porch, garage door and breezeway door jambs separated from veneer, and the front bay window separated from veneer. He concluded following review of mine maps that mining under permit No. 898-5228 had taken place east of the Maynard residence and that the maps and company survey notes were consistent.

In commenting on Maynard's allegation in the complaint that the mining area was sealed due to "water and bad top," Blumer explained that a U.S. Department of Labor, Mine Safety and Health Administration (MSHA), inspector indicated that the Pond Creek seam usually produces water and that it was normal practice to seal inactive works, but that MSHA did not have any information concerning the amount of water in the mine works adjacent to Maynard's property. He further explained that the roof and water conditions had not prevented the company from extending its mine works to the permit boundary.

In his Report, Blumer discussed the potential for mining-related subsidence from (1) high extraction mining, (2) mine roof failure, and (3) mining induced hydrologic impacts. He also discussed what he termed "pseudo-subsidence," i.e. whether non-mining related circumstances could have caused the damage (Report at 2-4).

First, Blumer determined that subsidence from high extraction mining did not cause the damage to Maynard's improvements. He based that conclusion on the fact that subsidence usually does not extend beyond a 30-degree angle of draw ^{6/} and that a 46-degree angle of draw would have been necessary to affect Maynard's swimming pool, the closest improvement to the mining area. He also calculated the stability of the coal pillars adjacent to the mine boundary and found them to be adequate.

^{4/} Although the report is unsigned and undated, the case record indicates that Blumer prepared the Report, and OSM confirmed that fact in its answer.

^{5/} Maynard raised two other issues that were addressed by LFO in its decision. The first related to an alleged failure by the operator to give a timely public notice. LFO explained that DSMRE had addressed that issue in a notice of non-compliance. The second issue concerned Maynard's allegation that the operator had mined outside the permit area. LFO found that DSMRE had failed to address that issue and it referred that issue back to PAO for further processing under the citizen's complaint procedures. Thus, that issue was not subject to appeal. Maynard did not raise the public notice issue on appeal. Therefore, the only issue presented in this appeal is the subsidence question.

^{6/} "Angle of draw" is defined in 1 SME Mining Engineering Handbook § 13.1-1 (1973) as "the angle between a vertical line from the edge of the opening

On October 10, 1991, at the request of Maynard, Blumer investigated soil cracks and slumping on the hillside behind Maynard's swimming pool which Maynard had flagged as evidence of subsidence. In the Report, Blumer admitted that the "potential exists that the features are subsidence related," but he stated that the features could also be "the result of natural movement of the soils on the steep slope (>26 degrees)" (Report at 2). He concluded the "[t]he features, regardless of cause, are local in nature and do not indicate a mass down-slope movement of the soils." Id.

Second, Blumer discounted the effect of mine roof failure and subsequent caving as a cause of Maynard's damage because, based on his assessment, any caving would stabilize and not extend to the surface.

Third, in reviewing the information to determine if mining resulted in water level fluctuations in the soil that could have caused the damage to Maynard's structures, Blumer determined that there was not conclusive evidence that mining had adversely affected the alluvial aquifer. He stated that the existence of mine water "does not automatically infer [sic] that there is a hydrologic connection between the mine works and the shallow alluvial aquifer," because the source of water could have been vertical and horizontal fractures (Report at 3). He found that conclusive evidence of the source of water did not exist.

Also, if subsidence did occur and assuming an angle of draw of 30 degrees, Blumer found that fractures at the bedrock interface would be at a higher elevation than the ground water level beneath Maynard's structures, and, therefore, "the fractures would not draw-down the ground water beneath the structures" (Report at 3).

Blumer also speculated that if subsidence did occur, fractures could redirect near-surface water, thereby affecting the recharge of the alluvial

fn. 6 (continued)

and another line extended to a point at which subsidence tails out to zero." The Handbook states further

"This angle has been found to be about 35° in Europe but is rather academic, being a function of instrument precision in detecting subsidence. Since the subsidence effect is so small at any point beyond a 25° angle, this latter may be considered the practical limit of subsidence. Furthermore, indications are that the angle of draw varies with depth and nature of the strata."

(Footnote omitted).

"Angle of draw" is also defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines 39 (1968), as:

"In coal mine subsidence, this angle is assumed to bisect the angle between the vertical and the angle of repose of the material and is 20° for flat seams. For dipping seams, the angle of break increases, being 35.8° from the vertical for a 40° dip. The main break occurs over the seam at an angle from the vertical equal to half the dip."

aquifer. However, he found insufficient information in the case to quantify recharge reduction.

Finally, he reviewed the conditions to determine if non-mining circumstances could have caused Maynard's problems. While he made no conclusions in that regard, he hypothesized that frost heaving could have been a source of the cracks or that "piping," which he described as subsurface erosion by water washing away fine-grained soil, under the house footing and swimming pool could have been occurring naturally or through the french drain located under the rear house footing.

On appeal, while Maynard commends Blumer on his thorough and professional manner in conducting his investigation, he takes exception to some of Blumer's assumptions and conclusions (Statement of Reasons (SOR) at 1). He states that he has "very serious reservations" that the maps of record actually show the extent of the mining operation (SOR at 1). He asserts that in 1987 he was informed by the Chief Engineer of Rawl Sales that the Big Bottom operation was pumping water from the mine on an around-the-clock basis and that if the pumps failed, the mine would be flooded. He contends that the sealing of the mine has effectively eliminated any possibility of an underground investigation to determine the extent of final mining activity.

He charges that OSM's subsidence determinations are based entirely on a theory, which he claims is not reliable. He asserts that based on conversations with unnamed mining engineers, it is their consensus that subsidence and subsidence-related damage are not totally predictable. Thus, he concludes that subsidence is the only logical explanation for the damage to his improvements because no disturbance-type activity (surface or subsurface) other than the mining activity has taken place within 1,000 feet of the property within the past 25 years.

Appellant rejects the notion that the damage sustained could have been caused by non-mining related factors. Frost heave is unlikely, appellant argues, because he has exposed water pipes in a crawl space which have never frozen. He dismisses the french drain as a contributing factor stating that the principal purpose of a french drain is to eliminate water from the foundation area and that his french drain is located at the top of his concrete footer.

In its answer, OSM argues that it conducted a proper investigation and reached a conclusion that is supported by the record, i.e. subsidence is not the cause of the damage to Maynard's improvements. Although Maynard disagrees with its conclusion, OSM stresses that appellant has presented no evidence of a causal relationship between the underground mining that occurred in the vicinity of his house in December 1989 and the damage which occurred in April 1991. OSM asserts that while it specifically ruled out subsidence as the reason for the damage, it did not attempt scientifically to establish the exact cause of the damage, but only suggested other possible sources.

[1] In this case, upon receipt of Maynard's citizen's complaint, OSM issued the TDN, which stated that based on the complaint, the Secretary had "reason to believe" Rawl Sales was in violation of the State program. See 30 U.S.C. § 1271(a)(1) (1988); Peter J. Rosati, 119 IBLA 219, 223 (1991). ^{7/} Under the regulations relating to the TDN procedure, upon receipt by the state regulatory authority of a TDN, it must take appropriate action or show good cause for not taking action to cause the violation, if any, to be corrected and respond within 10 days. 30 CFR 842.11(b)(1)(ii)(B)(1). In his case, DSMRE responded that it was unable to determine that the damage to Maynard's house and pool was mining related, and, therefore, it took no enforcement action.

The regulations provide that "good cause" includes: "[u]nder the State program, the violation does not exist." 30 CFR 842.11(b)(1)(ii)(B)(4)(i). In this case, DSMRE found that no violation existed because it was unable to determine that the damage was mining related. PAO then found that the State had shown good cause for not taking any action.

In its 1988 final rulemaking establishing the Department's policy on evaluation of state responses to TDN's, the Department stated:

In cases where a state concludes that no violation exists, [OSM] will defer to the state's decision unless it determines that the state conclusion was arbitrary, capricious, or an abuse of discretion. That is in keeping with the statutory framework, the congressionally mandated concept of primacy, and with the decision in In re: Permanent Surface Mining Regulation Litigation, [653 F.2d 514, 523 (D.C. Cir. 1981)] quoted earlier.

53 FR 26735 (July 14, 1988). The Department quoted the Circuit Court as stating that "[o]nce a state program has been approved, the state agency plays the major role, with its greater manpower and familiarity with local conditions. It exercises frontline supervision and the Secretary will not intervene unless its discretion is abused." 53 FR 26732-33 (July 14, 1988).

The Department further explained that

in determining whether a state action is arbitrary or capricious, the Secretary will continue to make independent determinations, based on the facts in each case. Such determinations are not required to be made on the basis of inspections, however. The

^{7/} Under 30 U.S.C. § 1271(a)(1) (1988), "Whenever * * * the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority * * * in the State in which such violation exists."

federal duty to inspect only occurs after the Secretary determines that the state action was not appropriate and the state did not have good cause for failing to take appropriate action.

53 FR 26735 (July 14, 1988).

That preamble language served as background for the standard for OSM's evaluation of a state response to a TDN, which is set forth at 30 CFR 842.11(b)(1)(ii)(B)(2): "[A]n action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so."

Thus, by regulation, the Department announced that it will not substitute its judgment for that of the state regulatory authority, except where OSM concludes that the response to the TDN was arbitrary, capricious, or an abuse of discretion. See Paul F. Kuhn, 120 IBLA 1, 16, 98 I.D. 231, 239 (1991). ^{8/}

Therefore, Maynard's burden is to establish that OSM erred in its good cause determination. To do so, he must show that DSMRE's response to the TDN was arbitrary, capricious, or an abuse of discretion. Maynard has made no such showing in this case.

LFO undertook an independent investigation following receipt of Maynard's request for informal review. That investigation confirmed DSMRE's conclusion that subsidence was not the cause of the damage to Maynard's house and pool. The principal basis for Blumer's conclusion in his Report that the damage was not caused by subsidence was his utilization of the angle of draw in conjunction with the mine maps and company survey notes. Although appellant challenges the use of that theory, he does so on the basis of apparent discussions with unnamed mining engineers who allegedly told him that subsidence and subsidence related damage are not always "totally predictable." However, even accepting that subsidence is not "totally predictable," utilization of an angle of draw to eliminate subsidence as a cause of the damage is not improper where the damage occurred at an angle of draw much greater than that normally accepted for the type of mining involved. Appellant has failed to show that OSM's use of the angle of draw to determine the range of possible subsidence was error.

Moreover, Maynard has not offered any evidence in support of his contention that mining-related subsidence caused the damage. Although he suggests that mining may have taken place closer to his house than indicated

^{8/} In the preamble to the final 1988 rulemaking, the Department endorsed the description of an arbitrary or capricious response, or one that would be an abuse of discretion under a state program by quoting from language in the preamble to the proposed rulemaking that such a response "would be one in which the state regulatory authority has acted irrationally, or without

on the mine maps, there is no evidence in the present record to support that charge. ^{9/} In his Report, Blumer noted that he had compared the map and notes and found them to be "consistent" (Report at 1).

OSM did not attempt scientifically to establish the exact cause of the damage to appellant's house and pool. In his Report, Blumer specifically found that subsidence did not cause the damage and that mine roof failure could not have caused the damage. He also found that the information related to water-level fluctuations in the soil due to mining was inconclusive. ^{10/} Finally, he found that non-mining related circumstances may have caused the damage.

The results of OSM's investigation supported DSMRE's response to the TDN. Maynard has failed to establish error in OSM's good cause determination. There is no evidence that DSMRE's response to the TDN was arbitrary, capricious, or an abuse of discretion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 8 (continued)

adherence to correct procedures, or inconsistently with applicable law, or without proper evaluation of relevant criteria." 53 FR 26733 (July 14, 1988).

^{9/} As mentioned supra at footnote 5, LFO referred the allegation of mining outside the permit area back to PAO.

^{10/} Appellant's assertion that the mine was sealed due to "bad top and water" is not borne out by the copy of the part of the mine map which he submitted to OSM in support of that allegation. The copy does have the notation "SEALED" in bold block letters printed vertically near the top; however, the notation concerning bad top and water appears near the bottom of the copy in much smaller block letters written nearly horizontally along the permit boundary. That notation is "0% MINING PERMITTED BAD TOP & WATER," which appears to indicate that only beyond the permit boundary did roof and water conditions preclude mining.